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In the Supreme Court of the United States

STACY FRY AND BRENT FRY,
AS NEXT FRIENDS OF MINOR E.F.,
Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* HON. LOWELL P. WEICKER, JR. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES . ii

INTEREST OF AMICUS CURIAE . . . 1

SUMMARY OF ARGUMENT . 2

ARGUMENT 5

I. The HCPA's Narrowly Worded Exhaustion Provision Was Inspired By, And Was Meant To Address, Claims Like Those In *Smith v. Robinson* That Are Substantively Identical to IDEA Claims. 7

II. Congress Rejected A Broad Exhaustion Provision For Non-IDEA Claims And Instead Adopted A Narrow One That Is Triggered Only Where Plaintiffs Actually Seek IDEA Relief. 11

III. This Court Should Construe 20 U.S.C. § 1415(l) Consistent With Congress's Intent To Expand, Not Diminish, the Right to Bring Non-IDEA Claims. 20

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 21

Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,
559 U.S. 280 (2010) 21

King v. Burwell,
135 S. Ct. 2480 (2015) 21

K.M. ex rel. Bright v. Tustin Unified Sch. Dist.,
725 F.3d 1088 (9th Cir. 2013) 6, 20, 24

Maher v. Gagne,
448 U.S. 122 (1980) 8, 9

Payne v. Peninsula Sch. Dist.,
653 F.3d 863 (9th Cir. 2011) 6, 20, 23

Smith v. Robinson,
468 U.S. 992 (1984) *passim*

Whitman v. American Trucking Association,
531 U.S. 457 (2001) 21

STATUTES AND REGULATIONS

Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* *passim*

20 U.S.C. § 1415(l) *passim*

42 U.S.C. § 1983 . . 16, 17

42 U.S.C. § 12132 23

Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796 . *passim*

OTHER AUTHORITIES

98 Cong. Rec. S9078-79 (daily ed. July 24, 1984) 11, 12, 27

131 Cong. Rec. E827-01 (Mar. 7, 1985) 13

131 Cong. Rec. H9964-02 (Nov 12, 1985) 17

131 Cong. Rec. S1151-01 (Feb. 6, 1985) 13

131 Cong. Rec. S10396-01 (July 30, 1985) 18, 19

132 Cong. Rec. S9277-01 (July 17, 1986) 19

Handicapped Children's Protection Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor, 99th Cong., 1st Sess. 7 (Mar 12, 1985) 13, 15

Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources, 99th Cong., 1st Sess. 1 (May 16, 1985) 12, 14, 15

H.R. 1523, 99th Cong. (1985) . 12

H.R. Rep. No. 99-296, at 4 (1985) 16, 17

S. Rep. No. 99-112, 99th Cong., 1st Sess. 3 (1985) . 18

Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599 (1987) 11

INTEREST OF AMICUS CURIAE[1]

Lowell Palmer Weicker, Jr. served as a U.S. Representative, as a U.S. Senator, and as the 85th Governor of Connecticut. In each capacity, Senator Weicker championed the rights of people with disabilities and their families with respect to access to health, education and all other civil rights. Senator Weicker was an architect of many of the leading modern-day disability rights laws, including the Individuals with Disabilities Act (IDEA), the Handicapped Children's Protection Act (HCPA) and the Americans with Disabilities Act (ADA). In the halls of Congress, he often acted and spoke not only as a U.S. Senator but also as a parent of a child with a disability.

In particular, Sen. Weicker took the lead in drafting, introducing, and enacting the HCPA, a provision of which is at issue here. Sen. Weicker introduced the HCPA in order to ensure that the families of children with disabilities are empowered to make the choices that are best for their children and, where necessary, to file suit to redress violations of their rights pursuant to disability statutes and other laws. He included in that legislation a provision meant to ensure the continued vitality for children with disabilities of claims pursuant to Section 1983 and Section 504 of the Rehabilitation Act following

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

Supreme Court precedent suggesting that the IDEA preempted such claims.

Lower courts have, unfortunately, misconstrued certain language in that provision in a manner that turns the HCPA, which was meant to enlarge the rights and remedies available to children with disabilities and their families, into a law that instead diminishes those available rights and remedies in many instances. Accordingly, Sen. Weicker files this brief to urge this Court to construe the HCPA in accordance not only with its plain language but also with the clear intent of Congress in enacting it.

SUMMARY OF ARGUMENT

In order to make it easier for families alleging that children with disabilities have been mistreated to enforce their rights in court, Congress enacted the Handicapped Children's Protection Act of 1986 ("HCPA"), Pub. L. No. 99-372, 100 Stat. 796. The HCPA provided that attorney's fees are available for parties prevailing on claims brought under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. In the provision at issue here, Congress further provided that the IDEA, which guarantees a free, appropriate public education, does not limit the ability to bring suits under other laws, such as Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. 20 U.S.C. § 1415(l). As a narrow exception to that general rule, parties actually seeking remedies available under the IDEA must exhaust the IDEA's administrative process before suing, whether their suit is brought under the IDEA or another law Congress intended 20 U.S.C. § 1415(l) to *eliminate*

potential barriers to the enforcement of non-IDEA rights rather than *imposing* them.

The Petitioners here brought only non-IDEA claims and sought only relief that is not available under the IDEA. Nonetheless, the Sixth Circuit held that Petitioners' claims must be dismissed for failure to exhaust those claims through the IDEA's administrative procedures before filing suit. It broadly construed the HCPA's exhaustion requirement to apply so long as the plaintiffs *conceivably could have* filed a suit seeking remedies available under the IDEA, regardless of whether they *did* file such a suit seeking IDEA remedies.

The Sixth Circuit's holding is irreconcilable with the text Congress enacted. It also turns congressional purpose upside down. The HCPA was meant to *increase* the ability of children with disabilities and their families to sue school districts in various ways, in response to this Court's decision in *Smith v Robinson*, 468 U.S. 992 (1984). In *Smith*, this Court held, among other things, that the IDEA's predecessor law, the Education of the Handicapped Act ("EHA"), effectively preempts substantively identical claims brought under other laws in order to obtain relief (in that case, attorney's fees) not available under the EHA. In response, Sen. Weicker introduced, and Congress enacted, the HCPA. Among other things, the HCPA added what is now 20 U.S.C. § 1415(l) to clarify that the IDEA does *not* preempt lawsuits or otherwise "restrict or limit the rights, procedures, and remedies available" under other laws.

Consistent with that general principle, the provision's exhaustion requirement does not purport to

apply to claims, such as the one at issue here, that do not allege an IDEA violation or seek relief that is available under the IDEA. To the contrary: it requires exhaustion through the IDEA process of claims brought under other laws only if plaintiffs are actually "seeking relief that is also available" under the IDEA. 20 U.S.C. § 1415(l). It thus is framed to apply only to claims, such as those in *Smith*, which amount to attempts to litigate an IDEA dispute under another name and through a different process. Congress specifically considered the argument that the exhaustion requirement should apply more broadly, whenever a plaintiff potentially has a claim under the IDEA. It declined to adopt such language, yet the Sixth Circuit ruled as though it had.

The Sixth Circuit's holding here is unfaithful both to the language Congress enacted and to Congress's purposes. Indeed, the Sixth Circuit's construction has the perverse result of turning 20 U.S.C. § 1415(l), a provision meant to *ensure* the ability of children with disabilities to bring non-IDEA claims such as the ones at issue here, into one that hinders their ability to do so. That was certainly not Congress's intent. This Court should, instead, construe that provision of the IICPA consistent with its plain language as well as the legislative intent to empower the families of children with disabilities to enforce their non-IDEA rights as well as their IDEA rights.

ARGUMENT

As Petitioner correctly explains, the Sixth Circuit misreads the IDEA's narrow exhaustion requirement. The only non-IDEA claims that must be exhausted through the IDEA process are those actually "seeking relief that is also available under" the IDEA itself. 20 U.S.C. § 1415(l). There is no basis for construing that language to reach claims that do not seek relief available under the IDEA, based solely on speculation that the plaintiffs *could* have sought such relief.

Notwithstanding that clear text, various policy rationales have been suggested for why Congress might have wanted a more expansive exhaustion provision. Whatever the policy merits of those arguments, they do not remotely reflect the actual choices Congress made. Congress enacted 20 U.S.C. § 1415(l) as part of the HCPA, the purpose of which was, in the wake of *Smith*, to expand the procedural rights available to children with disabilities under both the IDEA and other laws. *Smith* itself did not impose such a broad administrative exhaustion requirement as the one that the Sixth Circuit found, and Congress certainly did not intend the HCPA to extinguish rights that *Smith* left intact.

Rather, Congress added a narrow exhaustion proviso to a provision that clarifies that the IDEA does *not* limit the right to sue under Section 504 or other laws. That exhaustion proviso is meant to apply to non-IDEA claims that closely track IDEA rights and remedies, such as the claims at issue in *Smith*. Although overruling *Smith*'s holding that such duplicative claims could not be brought at all, the HCPA required those claims to be exhausted through

the IDEA process just the same as if they had been filed under the IDEA.

Where, as here, a family brings a suit that does not allege an IDEA violation or seek relief available under the IDEA—that is, a suit that could not have been filed under the IDEA—Congress intended 20 U.S.C. § 1415(l) to clarify that the IDEA does *not* limit a family's rights or remedies in any way. Congress rejected an alternative exhaustion provision suggested by the National School Board Association that would have applied more broadly to situations where a plaintiff *could have* enforced IDEA rights and sought IDEA remedies but chose not to do so. Such a broad requirement would have been inconsistent with the overall purpose of 20 U.S.C. § 1415(l) and the HCPA more generally, which was to clarify that the IDEA is a law that protects the rights of children with disabilities and their families, not one that limits their rights and remedies under other laws. Moreover, Congress recognized that making the exhaustion requirement contingent on whether an IDEA action *could have* been filed would mire the federal courts in pointless speculation about the merits of hypothetical lawsuits.

Thus, the general rule embodied by the HCPA is that "the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others." *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir 2013). The exhaustion proviso is "an exception to the general rule" that the IDEA should not be construed to restrict non-IDEA rights and remedies. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc). Exhaustion of IDEA

remedies for non-IDEA claims is not, as the Sixth Circuit mistakenly believed, the rule itself.

Congress recognized that the IDEA's rights and remedies, although important, are not the only legal protections that children with disabilities enjoy at school. Accordingly, Congress elected to empower children with disabilities and their families to make the decision either to seek IDEA remedies—in which case they must exhaust through the IDEA process—or to forego such remedies—in which case they have no obligation to do so. That was Congress's choice, and this Court should respect it.

I. The HCPA's Narrowly Worded Exhaustion Provision Was Inspired By, And Was Meant To Address, Claims Like Those In *Smith v. Robinson* That Are Substantively Identical to IDEA Claims.

The narrowly worded exhaustion language of 20 U.S.C. § 1415(l) was inspired by the fact pattern of *Smith v. Robinson*, as well as the back and forth between the majority and dissent. Accordingly, a close reading of *Smith v. Robinson* is instructive as to the intended meaning of the words Congress chose.

Although disagreeing as to the ultimate result in that case, both the majority and dissent in *Smith* agreed that claims that were substantively identical to EHA claims could not be brought directly in federal court under other laws as a way to evade the EHA administrative process. This, and no more, was the principle that Congress ultimately codified when it added narrow exhaustion language to a provision – 20

U.S.C. § 1415(l) – that was intended to *protect* the right to bring non-IDEA claims.

Smith v. Robinson began as a quintessential IDEA dispute: a challenge to a school system's refusal to pay for the private education of a child with cerebral palsy and other disabilities. The child's parents exhausted their administrative remedies under the EHA and filed a lawsuit in the district court. They contended that the school system's actions violated the child's right to a "free, appropriate educational placement without regard to whether or not said placement can be made within the local school system." 468 U.S. at 998. Well into the litigation, the plaintiffs filed an amended complaint that added substantively identical claims under the Equal Protection Clause of the U.S. Constitution and Section 504 and sought attorney's fees as a prevailing party under those laws. *Id.* at 1000.

The plaintiffs eventually prevailed on their EHA claim. Having granted plaintiffs all the relief they sought, the district court found it unnecessary to adjudicate the merits of the plaintiffs' other claims. 468 U.S. at 1001. It nonetheless awarded attorney's fees—which were not available under the EHA—because the plaintiff's non-adjudicated claims were sufficiently colorable to make the plaintiffs prevailing parties pursuant to *Maher v. Gagne*, 448 U.S. 122 (1980). *Id.* at 1002. But the court of appeals reversed the fee award, finding that plaintiffs' unadjudicated claims were not substantial, and this Court affirmed that decision.

This Court held that Congress intended the EHA to provide the exclusive rights and procedures for challenging the failure to provide a free appropriate

public education, precluding substantively identical claims under both the Constitution, 468 U.S. at 1012, and Section 504, *id.* at 1016-17 It reasoned that, in a case "[w]here § 504 adds nothing to the substantive rights of a handicapped child, we cannot believe that Congress intended to have the careful balance struck in the EHA upset by reliance on § 504 for otherwise unavailable damages or for an award of attorney's fees." *Id.* at 1021. Nor, it found, could Congress have intended that a plaintiff bringing what amounted to an EHA claim have "the possibility of circumventing EHA procedures and going straight to court with a § 504 claim." *Id.* at 1019. Rather, it reasoned, "there is no doubt that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to a free appropriate public education." *Id.*

This Court took care to "emphasize the narrowness of our holding." 468 U.S. at 1021. It did not "address a situation where the EHA is not available or where § 504 guarantees substantive rights greater than those available under the EHA." *Id.* Rather, it held only that where "whatever remedy might be provided under § 504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to § 504." *Id.*

Justice Brennan, joined by Justices Marshall and Stevens, dissented. Justice Brennan agreed with the majority that, "in enacting the EHA, Congress surely intended that individuals with claims covered by that Act would pursue relief through the administrative channels that the Act established before seeking

redress in court." 468 U.S. at 1023-24. But once such exhaustion has taken place, he reasoned, it would not conflict with the EHA to permit plaintiffs to bring substantively identical claims under other laws to get the benefit of additional remedies such as damages and attorney's fees. *Id.* at 1024-25.

Had Congress never passed the HCPA—if *Smith v. Robinson* were the last word governing the issues in dispute here—this Court's precedents would not have barred the Petitioners here from bringing their claims under the ADA and Section 504 without first utilizing the IDEA process. By its terms, *Smith* did not apply where, as here, the Section 504 claim neither enforces IDEA rights nor seeks remedies available under the IDEA, but rather vindicates "substantive rights greater than those available under the EHA," 468 U.S. at 1021.

It was against that background that Congress passed the HCPA, which eventually included the narrowly worded exhaustion language now at issue. As described in greater detail below, the HCPA was carefully crafted to overturn certain aspects of *Smith*. At the same time, it codified one point on which the majority and dissent agreed: that certain non-EHA claims, such as the ones at issue in *Smith*, were so duplicative of EHA claims that they had to be exhausted through the EHA process in the same manner as EHA claims. However, in describing which claims were subject to that requirement, Congress did not use the language of Justice Brennan's dissent—pursuant to which "individuals with claims covered by that Act [the EHA]" would be required to exhaust EHA procedures—nor did it adopt the National School Board

Association's broader proposed exhaustion requirement.

II. Congress Rejected A Broad Exhaustion Provision For Non-IDEA Claims And Instead Adopted A Narrow One That Is Triggered Only Where Plaintiffs Actually Seek IDEA Relief.

Just 19 days after *Smith* issued, bills were introduced in both the House and Senate to overturn the most troublesome results of that decision. *See* Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599, 612 n.91 (1987) (describing introduction of bills). Neither bill contained the exhaustion language now at issue.

In his statement introducing S. 2859, Sen. Weicker highlighted how critical it was that prevailing parties in EHA cases receive attorney's fees in order to empower parents to protect their children's rights. He also observed that the Supreme Court had misconstrued the intended relationship between the EHA and other laws protecting the rights of children with disabilities. He stated that Congress and multiple administrations had consistently assumed that the EHA and Section 504 "were intended to be free-standing, complementary—but not identical—legislative acts." 98 Cong. Rec. S9078-79 (daily ed. July 24, 1984). Moreover, Sen. Weicker observed, even if it were otherwise desirable to do so, treating the EHA as preempting the application of other laws would mire federal courts in endless disputes about whether such preemption is appropriate in particular cases. *Id.*

Sen. Stafford stated that, when Congress added an attorney's fees provision to the Rehabilitation Act in 1978, "we were concerned for the rights of all handicapped people. No exception was made for school-aged children." 98 Cong. Rec. S9103 (daily ed. July 24, 1984). He observed that the majority and dissent were correct in finding that Congress did not intend parents to "bypass" the EHA administrative system when enforcing their rights under that law, but said Congress "never envisioned" the EHA "as limiting or restricting the civil rights of handicapped children" under other laws. *Id.*

In the next congressional term, both chambers considered and eventually enacted reintroduced versions of those bills. Neither bill, as introduced, contained any exhaustion requirement.

Sen. Weicker introduced S. 415, which he explained was "a direct response to the *Smith v. Robinson* Supreme Court decision." *Handicapped Children's Protection Act of 1985: Hearing Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Human Resources*, 99th Cong., 1st Sess. 1 (May 16, 1985) ("Senate Hearing"). In particular, it was meant to change *Smith*'s bottom line that no attorney's fees were available "to parents who, after exhausting all available administrative procedures, prevail in a civil court action to protect their child's right to a free and appropriate education." *Id.* Accordingly, the bill's most important purpose was to explicitly provide that prevailing parties under the EHA were entitled to attorney's fees. *Id.* at 2.

In the House, Rep. Pat Williams introduced a similar bill, H.R. 1523, 99th Cong. (1985). He also

stated that the predominant purpose of that bill was to provide for recovery of attorney's fees by parents who prevail on EHA claims. 131 Cong. Rec. E827-01 (Mar. 7, 1985); *Handicapped Children's Protection Act: Hearing Before the Subcomm. on Select Education of the House Comm. on Education & Labor*, 99th Cong., 1st Sess. 7 (Mar 12, 1985) ("House Hearing").

As a secondary matter, the original version of both bills also clarified—in language that now constitutes the main clause of 20 U.S.C. § 1415(l)—that the EHA should not "be construed to restrict or limit the rights, procedures, and remedies available" under other laws. This provision was meant to restore the prevailing understanding, prior to *Smith*, that the EHA did not implicitly repeal rights and remedies available under Section 504. Such "rights, procedures and remedies" included not only the ability to seek damages but also the right to file a complaint with the Department of Education's Office of Civil Rights ("OCR"). In introducing the Senate bill, Sen. Weicker stated regarding this provision: "As a result of this clarification there will be no question about the commitment of Congress to guarantee to handicapped children the civil rights which are available to the rest of our country's citizens." 131 Cong. Rec. S1151-01 (Feb. 6, 1985).

Thus, 20 U.S.C. § 1415(l) was introduced in both chambers as a provision that *protects* the right of children with disabilities and their families to pursue non-EHA remedies. The exhaustion language now at issue was added as a proviso to those protections—a narrowly worded exception to the general rule. The National School Board Association ("NSBA") requested

a broader provision that would have required exhaustion of IDEA claims in any case where a plaintiff *could have* enforced IDEA rights and sought IDEA remedies—even if the plaintiff had chosen not to seek such IDEA remedies—but Congress rejected NSBA's approach.

The NSBA argued that claims enforcing the EHA right to a free appropriate public education should require exhaustion through the EHA process, regardless of whether they were brought under the EHA. For example, before the Senate, NSBA argued that, because "parents of handicapped students who are asserting claims of a violation of their right to a free appropriate public education are fully protected by EHA," it would be unnecessary and counterproductive to permit them to bring Section 504 claims alleging such violations outside the strictures of the EHA process. Senate Hearing at 74. For such claims, the NSBA argued, "by not requiring plaintiffs to exhaust the remedies of EHA, the EHA process itself is weakened." *Id.* at 75.

Similarly, before the House, an NSBA representative expressed the same concern about claims under other laws that simply enforced the EHA right to a free appropriate public education:

> If Section 504 is simply a superfluous claim that adds nothing to a handicapped child's substantive right to a free appropriate public education, then handicapped plaintiffs should be limited to seeking relief under the EHA. To provide otherwise would allow handicapped plaintiffs to forego the administrative

> procedures in the EHA and file a complaint, either with OCR or a court, under Section 504.

House Hearing at 27 (testimony of Jean Arnold).

To remedy this problem, the NSBA asked Congress to add an exhaustion requirement that would apply not only to plaintiffs who *actually* sought to enforce EHA rights, but also to plaintiffs who *could have* done so. Specifically, it asked for a provision stating that Section 504 claims could be brought "only where the EHA does not protect the rights of and provide remedies to the handicapped individual." House Hearing at 27 (testimony of Jean Arnold). In support of this proposal, the NSBA cited with approval Justice Brennan's statement that "a plaintiff with a claim covered by the EHA" should be required "to pursue relief through the administrative channels established by that Act before seeking redress in the courts" under another law. Senate Hearing at 75 (quoting *Smith v. Robinson*, 468 U.S. at 1024 (Brennan, J., dissenting)).

In response to the NSBA's concerns, the Senate and House both added the exhaustion clause now at issue in essentially the same form in which it eventually was enacted. Congress did not, as urged by the NSBA, require exhaustion whenever the IDEA "protect[s] the rights of and provide[s] remedies to the handicapped individual." Housing Hearing at 27. Instead, it required exhaustion only when a plaintiff actually seeks remedies available under the IDEA.

Congress understood well the meaning of the words it chose, not only because it was rejecting the alternative proposed by the NSBA, but also because it was reacting to language in *Smith v. Robinson*. In

Smith v. Robinson, the plaintiffs (after exhausting their EHA remedies) eventually pleaded non-EHA claims that sought both remedies available under the EHA and remedies unavailable under that law. The *Smith v. Robinson* majority repeatedly found it problematic that the plaintiffs in that case pleaded non-EHA claims in order to obtain remedies that were not available under the EHA. *See, e.g.*, 468 U.S. 1019-20 (permitting Section 504 claim raised "the possibility of a damages award in cases where no such award is available under the EHA"); *id.* at 1021 (Section 504 claim used to seek "otherwise unavailable damages"). In response, Congress crafted 20 U.S.C. § 1415(l), which makes it clear that the IDEA poses no barrier at all to claims seeking relief unavailable under the IDEA, but does require exhaustion of claims seeking relief available under the IDEA.

Both the Senate and House committee reports reflected a common understanding that, notwithstanding this amendment, the HCBA would ensure "the viability of section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 99-296, at 4 (1985) ("House Report"). Both reflected Congress's understanding that, consistent with the actual language of the exhaustion provision, exhaustion would only be required with respect to suits actually seeking relief available under the EHA, such that those suits could have been brought under the EHA itself.

The House Report stated that "before going to court, parents or guardians *seeking relief that is also available under EHA* must exhaust administrative remedies available under EHA to the same extent as

would be required had the action been brought under EHA." House Report at 7 (emphasis added). It then reiterated: "In other words, parents alleging violations for section 504 and 42 U.S.C. § 1983 are required to exhaust administrative remedies before commencing actions in court where exhaustion would be required under EHA *and the relief they seek is also available under EHA*." *Id.* (emphasis added). In practice, this meant that "a parent is required to exhaust administrative remedies where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." House Rep. at 7 And even then exhaustion would not be required where doing so would be futile – including where "the hearing officer lacks the authority to grant the relief sought" – or where the challenge was to an illegal policy or "practice of general applicability" rather than a decision limited to an individual child. *Id.*

As he brought the bill to the House floor, Rep. Williams highlighted the predominant purpose of 20 U.S.C. § 1415(l): "reestablishing the viability of Section 504 of the Rehabilitation Act of 1973 and other statutes as separate vehicles for ensuring the rights of handicapped children and youth." 131 Cong. Rec. H9964-02 (Nov 12, 1985). Neither he nor any member of the House suggested that the exhaustion clause was anything more than a narrow exception to that broad rule.

The Senate report reflected a similar understanding that the exhaustion requirement was triggered by full overlap between the actual suit brought and EHA remedies, not by the possibility that a different suit

could have been brought that would implicate EHA remedies. It stated that exhaustion was required "when a parent brings suit under another law *when that suit could have been brought under the EHA*." S. Rep. No. 99-112, 99th Cong., 1st Sess. 3 (1985); *accord id.* at 12 (exhaustion required "when a parent brings suit under another law when *that suit* could have been brought under the EHA") (emphasis added); *accord id.* at 15 ("if *that suit* could have been filed under the EHA, then parents are required to exhaust administrative remedies to the same extent as would have been necessary if the suit had been filed under the EHA") (emphasis added).

In subsequently describing S. 415 on the Senate floor, Sen. Weicker stated that the bill's purpose was "simple – to overturn the *Smith v. Robinson* decision," particularly with respect to the availability of attorney's fees for EHA claims but also with respect to the suggestion that the EHA could preempt rights and remedies available under other laws. 131 Cong. Rec. S10396-01 (July 30, 1985). He observed that, as a result of *Smith v. Robinson*, "handicapped children are now provided substantially less protection against discrimination than other vulnerable groups of people," and his bill "would remove these inequities by restoring equivalent protection to handicapped children." Sen. Kennedy added that S. 415 "clearly" provided that "the educational rights of handicapped children are protected from discrimination under Section 504 of the Rehabilitation Act and other civil rights statutes." *Id.*

Sen. Simon addressed the exhaustion clause at the greatest length, and essentially reiterated the understanding set forth in the Senate report. He

stated: "When parents choose to file suit under another law that protects the rights of handicapped children, if *that suit* could have been filed under the Education of the Handicapped Act, parents are required to exhaust the administrative remedies to the same extent as would have been necessary if the suit had been filed under the Education of the Handicapped Act." *Id.* (emphasis added). As did the Senate report, he observed that exhaustion would not be necessary "where the hearing officer lacks the authority to grant the relief sought." *Id.*

Conferees from the two chambers met to reconcile various disagreements between the two bills, none of which is material to the issue before this Court. In subsequently introducing the conference report on the House and Senate floors, lawmakers continued to express their understanding of the HCPA as intended to *expand* the rights of children with disabilities and their parents following *Smith*, not to diminish them in any way

As Sen. Weicker stated: "In adopting this legislation, we are rejecting the reasoning of the Supreme Court in *Smith v. Robinson*, and reaffirming the original intent of Congress that the educational rights of handicapped children and their parents shall not go unprotected." 132 Cong. Rec. S9277-01 (July 17, 1986). Sen. Simon added that the HCPA was meant, among other things, to reject the idea that the EHA "superseded and eliminated rights previously enacted under other laws." *Id.*

III. This Court Should Construe 20 U.S.C. § 1415(l) Consistent With Congress's Intent To Expand, Not Diminish, the Right to Bring Non-IDEA Claims.

In sum, there can be no question that 20 U.S.C. § 1415(l), like the larger bill of which it was a part, was intended to *expand* the ability of children with disabilities to bring non-IDEA claims, not *diminish* such rights. The predominant aim of that provision was to restore the general rule that "the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others." *K.M. ex rel. Bright*, 725 F.3d at 1097 The provision's exhaustion requirement is worded narrowly, and for good reason – it is "an exception to the general rule" that the IDEA should not be construed to restrict non-IDEA rights and remedies. *Payne*, 653 F.3d at 872.

The Sixth Circuit misconstrued the narrowly worded requirement to exhaust certain non-IDEA claims through the IDEA process as though it were the rule, rather than the exception. This construction is not simply inconsistent with Congress's intent – it gives 20 U.S.C. § 1415(l) an effect that is the opposite of what Congress intended. It turns a provision meant to *restore* the right to bring non-IDEA claims into one that *reduces* that right even more than did *Smith v. Robinson*. And it construes the exhaustion requirement as though Congress enacted the NSBA's proposed language, even though Congress declined to do so.

The lower court reached that erroneous result in part because it considered only the exhaustion clause of 20 U.S.C. § 1415(l). It did not consider the full sentence to which that clause is a mere proviso, let

alone the purposes of Congress in enacting the broader HCPA. As this Court regularly observes, in construing statutory provisions, courts "must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). A court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)). Here, the Sixth Circuit did not merely ignore the larger statutory purpose, it did not even consider the text of the full provision.

Whatever the policy merits might be of a decision to force all disputes that children with disabilities and their families may have with schools into the IDEA administrative process, that does not remotely resemble the choice Congress made when enacting the HCPA. The bill's language is not naturally read to have such a capacious exhaustion requirement, and no member of Congress understood or intended the bill to have that effect. Surely it would not have gone unnoticed if 20 U.S.C. § 1415(l), which was mentioned at every legislative step as a provision meant to ensure that the non-IDEA rights and remedies of children with disabilities would not be held preempted by the IDEA, had transformed into one with the opposite effect. *Cf. Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Congress made a different decision about the relationship between the IDEA and other laws protecting the rights of children with disabilities, one that is incompatible with the Sixth Circuit opinion here. It could have simply overruled the result of *Smith v. Robinson* by making attorney's fees available for prevailing IDEA plaintiffs. But Congress went further, also providing explicitly that it is improper to construe the IDEA as limiting rights and remedies guaranteed by other laws. And it rejected the NSBA's invitation to require exhaustion of claims under Section 504 and other laws unless plaintiffs could demonstrate that they had no protections available to them under the IDEA.

Congress understood that, fundamental as the IDEA's guarantee of meaningful education is for children with disabilities, it does not represent the entire sum of their rights and remedies vis-à-vis their schools or their education, and so it is inappropriate to force such children and their families to use the IDEA process to vindicate all such rights. A family that relies at times on the rights guaranteed by the IDEA does not thereby shed its rights guaranteed under other laws or the ability to enforce them outside the IDEA process. Rather, the choice remains at all times with that family to decide whether to pursue IDEA remedies or, as the Fry family did here, to forego whatever such remedies may have been available.

First of all, students with disabilities may have claims that relate tangentially, if at all, to their disabilities. For example, official conduct may violate the constitutional rights (or other generally applicable rights) of children with disabilities just the same as

with respect to any other children. Children with disabilities, like children without disabilities, may face unconstitutional discipline, First Amendment infringement, or other violations. While it may be conceptually possible to address some such violations within the IDEA framework, the IDEA is not meant to leave children with disabilities *worse* off, by preempting their general rights and remedies or by imposing procedural obstacles that would not apply to other children bringing the same claim. *See Payne*, 653 F.3d at 877 ("If the school's conduct constituted a violation of laws other than the IDEA, a plaintiff is entitled to hold the school responsible under those other laws."); *id.* at 878-79 ("If a disabled student would be able to make out a similarly meritorious constitutional claim—one that need not reference his disability at all—it is odd to suggest that the IDEA would impose additional qualifications to sue, simply because he had a disability ").

Moreover, disability-specific legal protections often exceed those rights guaranteed by the IDEA. As individuals with disabilities integrate into every aspect of society, our laws now explicitly recognize their right to an equal opportunity to participate in the public sphere—including, but not limited to, in educational settings. Most notably, Congress enacted the landmark Americans with Disabilities Act of 1990. That law, along with its implementing regulations, sets the ambitious goal of providing full equality *See, e.g.*, 42 U.S.C. § 12132 (no qualified individual with disability may be "denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity").

As this case illustrates, children with disabilities have enforceable rights against their schools under the ADA or related laws that do not track, and often exceed, the IDEA's protections. For example, certain accommodations may be sufficient to provide a deaf child with a free appropriate public education, and thus satisfy the IDEA, but that does not necessarily suffice to provide that child with the full equality mandated by the ADA. *See K.M. ex rel. Bright*, 725 F.3d at 1097 So, too, a person such as petitioner may have a right to a service animal in a variety of public spaces – including but not limited to schools – that has little or nothing to do with the right to a free appropriate public education. Or a child with a disability may get treated in nakedly discriminatory fashion. Once again, even assuming that the rights thus violated may overlap sufficiently with those rights guaranteed with the IDEA that it is sometimes possible for the IDEA administrative process to address these claims to some extent, Congress did not *require* parents to go that route. To the contrary, in the HCPA, Congress explicitly clarified both that the IDEA does not limit rights and remedies available under other laws and that it is a family's decision whether to pursue remedies available under the IDEA and thus have to exhaust the IDEA administrative procedures.

This case illustrates well the wisdom of Congress's choice. A school district's refusal to allow a child with a disability to use her service dog implicates both IDEA rights and non-IDEA rights, but does so very differently. such that the school district can satisfy its IDEA obligations and still violate the ADA. And even if some aspect of such a controversy could be adjudicated within the IDEA framework, *requiring*

parents and children to do that in *all cases*—whether or not they actually want any relief available under the IDEA—seriously infringes not only their litigation rights but also their freedom to make educational choices. It also mires courts in difficult and unnecessary adjudication concerning the viability of non-existent IDEA claims.

After initially pursuing a modification to E.F 's IEP—*i.e.*, attempting to protect E.F 's rights within the IDEA process—the Frys chose first to homeschool E.F and then to enroll E.F in a different, more accommodating district. Because E.F has not been enrolled in the district for some time and has no present intent to return, as the Sixth Circuit acknowledged, it is not obvious how the Frys *could* pursue IDEA administrative remedies even if they wanted them. Pet. App. 17 Accordingly, the Frys seek only money damages for the district's past conduct, a remedy that is not "also available under" the IDEA, 20 U.S.C. § 1415(l).

Nonetheless, the Sixth Circuit found the family's non-IDEA claims barred for failure to exhaust remedies that may not even be available, largely because it was the Frys' educational decisions that foreclosed the possibility of IDEA relief. It felt constrained to reach this result because it feared plaintiffs otherwise would "evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief." Pet. App. 18.

The Sixth Circuit correctly noticed that an exhaustion doctrine based on what claims *could* be filed is subject to manipulation, but it drew the wrong conclusion from that fact. It should have recognized

this as a reason that Congress declined to enact such a rule. Instead, in an attempt to discourage evasion of the IDEA administrative process, it found that the Frys—by making educational choices in the best interests of their child—thereby forfeited their claims for damages or other non-IDEA relief brought under other laws, since they no longer could exhaust such claims through the IDEA process.

This unjust result completely upends Congress's intent. The IDEA in general, and the HCPA more specifically, are meant to expand the rights and remedies available to children with disabilities and their families, not to hamstring their ability to make educational choices and put them to difficult decisions not faced by families not covered by the IDEA. Congress enacted the narrow exhaustion language of 20 U.S.C. § 1415(l) to prevent actual, live IDEA claims from being dressed up as something else, not to punish families for pursuing the educational paths they think best for their children because those educational choices might "render the dispute moot for purposes of IDEA relief." Pet. App. 18.

Moreover, under the Sixth Circuit's reading, 20 U.S.C. § 1415(l) sets a trap for the unwary that empowers lawyers rather than parents. Under that reading, school officials will be incentivized to conjure up novel IDEA claims that a family could have brought (but did not), while lawyers for children with disabilities are in the uncomfortable position of advocating against the availability of such claims. Congress intended the HCPA to make it *easier* for families to navigate the IDEA process and protect their rights under the IDEA and other laws. It did not intend

to create endless opportunities for school lawyers to construct procedural hurdles to block courts from reaching the merits of claims that school districts have violated the rights of children with disabilities and their families.

As Sen. Weicker presciently observed following *Smith v. Robinson*, construing the IDEA to preclude claims under other laws inevitably creates "an enormous number of disputed court cases" about whether such preclusion is appropriate. 98 Cong. Rec. S9078-79 (daily ed. July 24, 1984). *Smith v. Robinson*'s reasoning thus was not only unjust to affected families, it was "unworkable" for the judicial system. *Id.*

Accordingly, Congress narrowly worded the exhaustion provision of 20 U.S.C. § 1415(l) to be triggered only when families are actually "seeking" relief available under the IDEA. This standard is simple to apply, as it does not require speculation as to the viability of hypothetical alternative claims. It also empowers families of children with disabilities, by allowing them to make the choices that either trigger the exhaustion requirement or do not. Families can enforce against a school district the specific rights and remedies conferred by the IDEA, in which case they must exhaust the IDEA's administrative processes no matter what law they cite. Alternatively, they can choose to forego their IDEA rights and remedies against that district—whether by pleading a complaint that does not seek such remedies, or through educational choices made on the ground that render such remedies unavailable—in which case the IDEA does not stand in the way of whatever distinct remedies they might have under other laws.

That was the decision Congress made, as reflected in clear statutory language as well as authoritative legislative history. This Court should respect Congress's choice.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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